Ohio Plate Glass Company, Topp Division *and* Truck Drivers, Warehousemen and Helpers, Local Union No. 908 a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 8-CA-15708

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 28 April 1982, the General Counsel of the National Labor Relations Board issued a complaint 21 May 1982 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 6 April 1982, following a Board election in Case 8-RC-12438, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 20 April 1982 the Company has refused to bargain with the Union. On 1 June 1982 the Company filed its answer admitting in part and denying in part the allegations in the complaint.[1]

On 8 November 1982 the General Counsel filed a Motion for Summary Judgment. On 12 November 1982 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Company's answer admits its refusal to bargain with the Union, but in its response to the Notice to Show Cause, the Company attacks the validity of the certification on the basis of its objection to the election in the representation proceeding. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 8-RC-12438, reveals that an election was held 15 May 1981 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 32 eligible voters, 17 cast valid ballots for, and 13 against, the Union; there were no challenged ballots and 1 void ballot. Thereafter, the Company filed a timely objection to the election alleging, in substance, that certain employees had engaged in threats and acts of coercion directed at other employees which destroyed the required laboratory conditions for a free and fair election and created a general atmosphere of confusion and fear of reprisal among employees. After conducting an investigation, the Regional Director on 18 June 1981 issued his report recommending that the objection be overruled. The Company filed exceptions to the recommendation, claiming that the Regional Director had erred in failing to recommend that the election be set aside or, at the least, to direct an evidentiary hearing to resolve factual issues which the Company contended were raised by the objection. The Company also argues that, if the contents of the Regional Director's investigation were not part of the record before the Board, then the Board should order that the Regional Director forward them to the Board. On 6 April 1982 the Board adopted the recommendation of the Regional Director and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.[2] The Board noted that the Company had submitted to the Regional Director three employee affidavits in support of its objection, which, in turn, the Regional Director had appended to his report. The Board observed that the Regional Director had relied only on these affidavits, accepting as true the facts most favorable to the Company, in overruling the objection.[3]

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

[1] The complaint also alleges, but the Respondent denies, that the Respondent attorney is an agent of the Respondent within the meaning of Sec. 2(13) of the Act. The Respondent's refusal to bargain was communicated to the Union in a 20 April 1982 letter from the Respondent's attorney. The Respondent, by admitting that it refused to recognize and bargain with the Union on 20 April 1982, has adopted and ratified its attorney's actions. The technical issue of whether the Respondent's attorney is its agent within the meaning of Sec. 2(13) of the Act is thus moot, and does not raise a material issue of fact which warrants a hearing.

[2] Chairman Dotson and Member Hunter note that they did not participate in the underlying representation proceeding.

[3] Since the Regional Director appended to his report the Company's evidence, it became part of the record as defined in Sec. 102.69(g) of the Board's Rules and Regulations and was fully considered by the Board. See *Frontier Hotel*, supra.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[4] Rather the Company contends that an evidentiary hearing concerning its objection should have been held.

In *Frontier Hotel*, supra, we reiterated that the objecting party must present the Regional Director with sufficient evidence to establish a prima facie case of objectionable election interference. We expressly noted that it is the burden of the objecting party to identify evidence which shows that in overruling the objection the Regional Director resolved substantial and material issues of fact without the benefit of a hearing. The Regional Director, however, is not permitted to rely on facts outside the scope of the objecting party's evidence to overrule the objection, if otherwise, a prima facie showing of objectionable conduct exists.

In the representation case, the Regional Director's report on the objection included information outside the scope of the Company's affidavits. The Company has never taken issue with this information as being untrue or incorrect. More importantly, the stated conclusions in the Regional Director's report, however, did not rely on this additional information but instead relied on the facts contained in the Company's own affidavits which were accepted as true. The Board agreed with the legal conclusions of the Regional Director, which differed from those advanced by the Company, and found no merit to the objection based on the facts supplied by the Company itself. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, is engaged in the assembly and distribution of thermal insulated glass windows at its facility in Sidney, Ohio, where it annually received goods and materials valued in excess of $50,000 directly from outside the State. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 15 May 1981 the Union was certified 6 April 1982 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including truck drivers and janitors, at its Sidney, Ohio location, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 13 April 1982 the Union has requested the Company to bargain, and since 20 April 1982 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 20 April 1982 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert.

[4] The fact that the Company disagrees with the conclusion of the Regional Director, adopted by the Board, and that the objection lacked merit and did not require an evidentiary hearing does not constitute a special circumstance. The Company's allegation that there are special circumstances present in this case is supported by nothing more than its contention, rejected in the representation proceeding, that the information which it presented to the Regional Director during his investigation was sufficent to necessitate the holding of an evidentiary hearing. Thus, no special circumstances have been shown.

denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Ohio Plate Glass Company, Topp Division, Sidney, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Truck Drivers, Warehousemen and Helpers, Local Union No. 908, a/w The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, including truck drivers and janitors, at its Sidney, Ohio location, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Sidney, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Truck Drivers, Warehousemen and Helpers, Local Union No. 908, a/w The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees, including truck drivers and janitors, at our Sidney, Ohio location, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

OHIO PLATE GLASS COMPANY, TOPP DIVISION

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."